

STATE OF MICHIGAN
COURT OF APPEALS

REGINALD WILSON,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED

June 14, 2002

No. 229076

Court of Claims

LC No. 00-017540-CM

Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(7), (8) and (10). We affirm.

I. Background Facts and Procedural History

This action concerns plaintiff's termination from his position as a library assistant in one of defendant's correctional facilities. Plaintiff was terminated because he was found in possession of a controlled substance. The parties submitted this case to arbitration and plaintiff's grievance was denied. On January 26, 2000, plaintiff filed a complaint against defendant essentially alleging wrongful termination and breach of the duty of fair representation. Plaintiff further requested that the arbitrator's decision be overturned because it was contrary to the facts and law.

The facts surrounding plaintiff's termination are presented in his complaint and are essentially undisputed. Defendant hired plaintiff on October 9, 1994 and thereafter, plaintiff became a member of the United Autoworkers International Union (UAW). The UAW and defendant were parties to a collective bargaining agreement that required that termination of employment be based only on just cause.

Defendant claimed that it received a tip that plaintiff was going to deliver contraband to an inmate during plaintiff's work shift on March 4, 1998. When plaintiff arrived at work that day, he was searched but no marijuana was discovered in his possession. Despite this fact, defendant continued to watch plaintiff throughout the day. When the suspected inmate entered the library, the library doors were locked and defendant's employees searched the inmate for marijuana. Defendant did not find any marijuana on the inmate. While the inmate was being searched, another employee for defendant escorted plaintiff to a room where he was observed for

approximately thirty to forty minutes before being moved to another office. Two of defendant's supervisors were present in the office when plaintiff was searched for a second time. As the search was concluding, a third supervisor entered the office and noticed an object on the floor in front of the desk. Plaintiff's complaint states that this was behind the supervisor who was searching plaintiff. The object was later determined to be a balloon containing seven grams of marijuana. Plaintiff was terminated on April 24, 1998, for violating defendant's work rule number 17: Controlled Substance – Possession or Introduction in Correctional Facilities.

Plaintiff filed a grievance with the UAW to protest his termination and an arbitration hearing was held on August 5, 1998. On February 26, 1999, the arbitrator issued a written opinion and award. According to the arbitrator, plaintiff was not a credible witness; moreover, the arbitrator found that the supervisor who conducted the search on plaintiff in the office was an extremely credible witness. The arbitrator cited the fact that plaintiff and the inmate were identified in a tip and that they were later observed together. The arbitrator further found that the office was searched before plaintiff entered it and that there was no marijuana found on the floor during that search. Additionally, the arbitrator noted that "[c]ircumstantial evidence is good evidence if it is sufficient to clearly and convincingly prove that the marijuana-filled balloon on Shorter's office floor belonged to [plaintiff]." Based on the facts presented, the arbitrator denied plaintiff's grievance and upheld defendant's actions.

Plaintiff's complaint states that he was wrongfully terminated from defendant's employ because defendant failed to show that he possessed the marijuana. The complaint notes that defendant never claimed that it ever specifically saw plaintiff with marijuana. Moreover, the complaint states that the UAW failed to fairly represent plaintiff because it did not present the arbitrator with background evidence on the supervisors that searched him.¹ Plaintiff's complaint also states that the UAW failed to provide a detailed drawing of the office to the arbitrator. Plaintiff states that the diagram would have depicted the fact that plaintiff was sitting while being searched and that the marijuana was discovered behind the supervisor searching him. Plaintiff requests that the arbitration decision be overturned because it was based on questionable and inaccurate circumstantial evidence. Specifically, the complaint states that if the UAW had properly represented plaintiff, then the arbitrator would not have upheld his termination. As such, plaintiff claims that he is entitled to damages in the form of lost wages, contractual benefits, reversal of the arbitrator's decision, reinstatement of his employment, and costs and attorney fees.

Defendant filed a motion for summary disposition on February 24, 2000, pursuant to MCR 2.116(C)(7), (8), and (10). Defendant argued that the doctrine of collateral estoppel barred plaintiff's wrongful termination claim and that plaintiff could not establish sufficient facts to warrant reversal of the arbitrator's decision due to the limited scope of judicial review. Defendant also maintained that plaintiff's allegation concerning fair representation failed to state a claim against defendant. Additionally, defendant noted that the remainder of plaintiff's

¹ Plaintiff purports that one of the supervisors that searched him was fired by the Detroit Police Department for involvement in narcotics and that another supervisor was disciplined for sexual harassment. Plaintiff contends that this information impacts the credibility of these witnesses.

complaint did not state a claim upon which relief could be granted. Defendant argued that the frivolous nature of the action entitled it to reasonable attorney fees and costs.

In his response to defendant's motion, plaintiff argued that his complaint was not barred solely because the UAW arbitrated his grievance. Rather, plaintiff alleged that discovery would allow him to show that the arbitrator's decision was procured by undue means and could therefore be vacated by the court. Notably, plaintiff cited the UAW's arbitrary misconduct in failing to inform the arbitrator about the past conduct of several key witnesses when he alleged that the case was based on circumstantial evidence. Moreover, plaintiff noted that there is no caselaw requiring him to name the UAW as a party in order to prove a claim against defendant for wrongful discharge.

A hearing was held on June 14, 2000, to address defendant's motion for summary disposition. The trial court found that the arbitrator had jurisdiction to construe the just cause section of the collective bargaining agreement. The trial court further stated that plaintiff failed to provide any reason to overturn the arbitrator's decision. The trial judge concluded that plaintiff's complaint only asserted the UAW's incompetent representation and that the arbitrator made a bad decision regarding the credibility of witnesses. The trial court noted that plaintiff may have a cause of action against the UAW but that he never named it as a defendant. Additionally, the judge declared that plaintiff's claim was frivolous and awarded defendant reasonable attorney fees in the amount of \$2,120.00. An order granting defendant's motion for summary disposition, pursuant to MCR 2.116(C)(7), (8), and (10), was entered on July 19, 2000.

II. Summary Disposition

Plaintiff claims that the trial court erred in granting summary disposition before the commencement of discovery. Specifically, plaintiff insists that discovery would have given him the opportunity to show that the UAW failed to fairly represent him and that this adversely affected the arbitration proceedings. Plaintiff asserts that the arbitrator's award should be vacated and that he was wrongfully terminated. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition *de novo*. *Draprop Corp v Ann Arbor*, 247 Mich App 410, 415; 636 NW2d 787 (2001). An agreement to arbitrate bars a claim. MCR 2.116(C)(7). In a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court reviews the affidavits, pleadings and other documentary evidence presented by the parties and "accept[s] the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true." *Novak v Nationwide Mutual Ins, Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999). A MCR 2.116(C)(8) motion for summary disposition tests the legal sufficiency of the complaint and all well-pleaded allegations are accepted as true and construed in a light most favorable to the non-movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). However, summary disposition is appropriate under MCR 2.116(C)(10), if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Haaksma v Grand Rapids*, 247 Mich App 44, 57; 634 NW2d 390 (2001). "In deciding a motion under this rule, we review affidavits, pleadings, depositions, admissions, and other documentary evidence to determine if a record might be developed that would leave open an issue on which reasonable minds could differ." *Id.* While summary disposition is generally considered premature when granted before discovery is completed, it may be proper if further discovery would most likely fail to uncover factual support for the non-

moving party's position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

We note that judicial review of an arbitration award is extremely limited and that a court cannot review an arbitrator's factual findings and decision on the merits. *Lenawee Co Sheriff v Police Officers Labor Council*, 239 Mich App 111, 117-118; 607 NW2d 742 (1999). "Rather, a court may only decide whether the arbitrator's award 'draws its essence' from the contract. If the arbitrator in granting the award did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases." *Id.* at 118, quoting *Lincoln Park v Lincoln Park Police Officers Assoc*, 176 Mich App 1, 4; 438 NW2d 875 (1989).

The grievance procedure contained in the collective bargaining agreement in this case specifically stated that "[t]he decision of the Arbitrator will be final and binding on all parties to this Agreement." An employer can generally rely on the finality of an arbitrator's decision as provided in the collective bargaining agreement. *Pearl v Detroit*, 126 Mich App 228, 238; 336 NW2d 899 (1983). However, the union's breach of the duty of fair representation can remove the "bar of finality" and permit a suit for breach of contract. *Id.* Indeed, after submitting to binding arbitration, an individual cannot pursue a breach of contract claim against an employer unless that person is first successful in showing a breach of the duty of fair representation.² *Knoke v East Jackson Public School Dist*, 201 Mich App 480, 485; 506 NW2d 878 (1993). A union breaches its duty of fair representation if its actions are "arbitrary, discriminatory, or in bad faith." *Silbert v Lakeview Education Assoc, Inc*, 187 Mich App 21, 25; 466 NW2d 333 (1991).

Plaintiff does not contend that the UAW's actions were discriminatory. Rather, plaintiff opines that the UAW acted arbitrarily and in bad faith. He alleges that the UAW's failure to offer evidence attacking the credibility of defense witnesses or to provide an accurate diagram of the room where the marijuana was discovered, caused the arbitrator to make the wrong decision.

² According to *Rowry v University of Michigan*, 441 Mich 1, 14, n, 6; 490 NW2d 305 (1992), (Griffin, J., concurring) (citations omitted):

The *DelCostello* Court considered the application of state contract statutes of limitation to federal "hybrid § 301" actions, in which the employee sues the employer under § 301 of the Labor-Management Relations Act, 29 USC § 185, alleging a breach of a collective bargaining agreement. Because most such cases involve a collective bargaining agreement that designates the union as the employee's sole representative, the employee must also allege a breach of the union's duty of fair representation in order to avoid an exhaustion of remedies defense. In such a case, "[t]he employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both. The suit is thus not a straightforward breach-of-contract suit under § 301 . . . but a hybrid § 301/fair representation claim"

See also *O'Keefe v Dep't of Social Services*, 162 Mich App 498, 508; 413 NW2d 32 (1987) ("It makes no difference whether the employee sues the union alone, the employer alone, each separately, or both together.").

After reviewing the record in this case, we find that plaintiff's argument is meritless and that discovery would not have uncovered further support for his assertions.

Initially, we conclude that the UAW's failure to introduce this evidence does not amount to bad faith. See *Martin v Shiawassee County Bd of Comm'rs*, 109 Mich App 32; 310 NW2d 896 (1981). While the plaintiff in *Martin* stated that her union made several evidentiary errors, this Court held that the alleged errors did not amount to bad faith. *Id.* at 35. "Her complaint does not allege that AFSCME [her union] refused to represent her or failed to take her grievance to arbitration. While she does allege that AFSCME's representative made some errors at the arbitration proceedings, these tactical errors, if in fact they were errors, do not evidence bad faith." *Id.* While the UAW may have erred in failing to present certain evidence, its actions did not amount to bad faith for purposes of establishing a breach of the duty of fair representation.

Additionally, we do not find that the UAW acted arbitrarily or perfunctorily in failing to provide the arbitrator with this evidence. A union fails to provide fair representation when it acts carelessly or with indifference towards the interests of those affected. *Goolsby v Detroit*, 419 Mich 651, 679; 358 NW2d 856 (1984). Mere negligence is insufficient to establish a claim for unfair representation. *Id.* at 676. However, "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Airline Pilots Assoc, Intern'l v O'Neill*, 499 US 65, 67; 111 S Ct 1127; 113 L Ed 2d 51 (1991) (citation omitted).

Other than listing four pieces of evidence that the UAW neglected to provide the arbitrator, plaintiff has failed to show that the UAW's actions were so arbitrary as to be considered irrational. Indeed, the UAW presented several arguments attacking the viability of defendant's case and maintaining plaintiff's innocence. The UAW claimed that the marijuana was planted on plaintiff as part of a set-up to make him an informant. Additionally, the UAW noted the secluded location of plaintiff's search and that fact that prior to the search plaintiff had ample time to dispose of any contraband if he possessed any. The UAW also presented the argument that defendant failed to defer to the Michigan State Police investigation that found insufficient evidence of plaintiff's guilt. The arbitrator addressed all of these issues in its decision.

Plaintiff argues that the UAW failed to provide the arbitrator with an accurate diagram depicting the location of plaintiff and the marijuana during the search. However, this evidence was actually presented during the hearing. The arbitrator specifically noted in her opinion that the supervisor searching plaintiff had his back to the front of the desk, and that toward the end of the search, an officer entering the office noticed the marijuana underneath the front of the desk. Thus, the arbitrator was aware of the fact that the supervisor was between plaintiff and the desk, and that the marijuana balloon was located behind the supervisor.

Furthermore, plaintiff has failed to show how the UAW's failure to present evidence of the past narcotic involvement and sexual harassment charges against two of defendant's supervisors amounted to unreasonable and irrational action. Plaintiff simply claims that this evidence would have detracted from the credibility of defendant's witnesses. However, the arbitrator did not rely solely on either of these individuals in determining that plaintiff was culpable. The failure to present this evidence does not rise to the level of ineptness displayed in *Goolsby, supra* at 680, where the union failed to properly file a valid grievance. Rather, it

appears from the record that the UAW presented several arguments on behalf of plaintiff and there is no evidence that the UAW acted with extreme recklessness or gross negligence.

Absent a plausible claim against the UAW for breach of its duty of fair representation, plaintiff cannot pursue his breach of contract claim against defendant. See *Knoke, supra* at 485. Consequently, we find that the trial court properly granted defendant's motion for summary disposition.

III. Frivolous Claim

Plaintiff further argues that the trial court erred in finding that his action was frivolous because he had agreed to binding arbitration. Specifically, plaintiff contends that the arbitration decision could have been vacated because of the UAW's misconduct. We disagree. We review a trial court's decision that a claim was frivolous for clear error. *Michigan Twp Participating Plan v Federal Ins Co*, 233 Mich App 422, 436; 592 NW2d 760 (1999). A decision is clearly erroneous when after a careful review of the record, this Court is left with the definite and firm conviction that a mistake was made. *Michigan Ed Assoc Political Action Comm v Secretary of State*, 241 Mich App 432, 444; 616 NW2d 234 (2000).

According to MCL 600.2591, an action is frivolous if:

- (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
- (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
- (iii) The party's legal position was devoid of arguable legal merit.

Because we conclude that the arbitrator's decision was binding and that plaintiff failed to present a legitimate argument rendering it invalid, we find that the trial court correctly assessed sanctions against plaintiff.

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Jessica R. Cooper